STATE OF MICHIGAN
IN THE 4th JUDICIAL CIRCUIT COURT COUNTY OF JACKSON
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff, **Case No. 20-003172-FH**
Hon. Thomas Wilson

V

JOSEPH MORRISON
Defendant.

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DEFENDANT'S BRIEF IN RESPONSE TO THE PEOPLE'S GOECKE MOTION TO AMEND THE INFORMATION

ARGUMENT

I. Standard of Proof

A magistrate may bind a defendant over for trial if "it shall appear from the proofs that an offense not cognizable by [the district court] has been committed, and that there is probable cause for charging defendant." *People v Doss,* 406 Mich 90, 100 (1979). "If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that

is not a felony." MCL 766.13. The two-part inquiry at a preliminary exam is first whether a felony offense has been committed, and second, is whether there is probable cause that the defendant committed that offense. *People v Johnson,* 427 Mich 98, 104 (1986).

The district court's inquiry should not be limited to the prosecution's presentation of evidence of each element and a determination of probable cause. Rather, the magistrate has a duty to make a determination after "an examination of the whole matter." *People v King,* 412 Mich 145, 154 (1981). The Michigan Supreme Court has interpreted this requirement to mean that the examining magistrate must at least consider defenses that mitigate the prosecution's case, therefore affecting the magistrate's decision of whether or not to bind the defendant over for trial. *Id.*

The district court's decision to bind over is normally reviewed for an abuse of discretion. *People v Schaub,* 254 Mich App 110, 114 (2002). An abuse of discretion occurs when the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *McKinley, supra*.

In the case at-hand the district court did not abuse its discretion by declining to bind over on the charge of making and communicating a threat of terrorism because there was no evidence Defendant made a "true threat" nor was the threat "communicated" as the statute intended.

I. Defendant engaged in Constitutionally Protected speech which was "Political Hyperbole" and was not a "True Threat".

The First Amendment prohibits government officials from punishing individuals for engaging in protected speech and secures the right to petition the government for redress of grievances. *Holeton v City of Livonia, No. 341624, 2019 WL 2016252 (Mich Ct App, May 7, 2019)*

Speech over the internet is entitled to First Amendment protection in the same manner as traditional speech. TM v MZ, 326 Mich App 227; 926 NW2d 900 (2018). Constitutionally protected speech includes all speech, except that falling into certain categories, including defamation, fighting words, inciting imminent lawless action, and true threats. TM v MZ, 326 Mich App 227; 926 NW2d 900 (2018). First Amendment protections are not absolute; governmental regulation of certain categories of speech is permissible without violating an individual's right to free expression, such as statements deemed to comprise **"true threats," which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence** to a particular individual or group of individuals. People v Osantowski, 274 Mich App 593; 736 NW2d 289 (2007), rev'd in part, app den in part 481 Mich 103; 748 NW2d 799 (2008).

Specifically, MCL 750.543m(1)(a) criminalizes the "making [of] a terrorist threat" by threatening to "commit an act of terrorism" and the communication of that "threat to any other person." An "act of terrorism" is defined as a **"willful and deliberate act"** that would comprise a "**violent felony,"** known to be "dangerous to human life," and that "is intended to intimidate or coerce a civilian population or influence or affect the conduct of government ... through intimidation or coercion." MCL 750.543b (a).

Nothing the people allege that Joseph Morrison shared or posted consisted of a "violent felony" because nothing he posted about was dangerous to human life.

Further in People v. Osantowski, the Defendant, when arrested, defendant denied having the intent to harm anyone, and indicated that his verbal behavior did not encompass a "true threat" but merely an expression of his anger and "bad talk." Thus, it was incumbent on the prosecution to demonstrate that defendant's words were not **mere hyperbole**, but rather

comprised a “true threat.” People v Osantowski, 274 Mich App 593, 609; 736 NW2d 289, 301 (2007), rev'd in part, app den in part 481 Mich 103; 748 NW2d 799 (2008). In People v. Watts, federal authorities charged young, African-American protestor Robert Watts with violating a federal threat law criminalizing threats against the President. In Watts, the Supreme Court found the defendant’s statement “**If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."** to be mere political hyperbole and protected speech. Watts v. United States, 394 U.S. 705 (1969). There the Supreme Court ruled “But whatever the "willfullness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of **political hyperbole** indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964).

The three factors identified by the Court in *Watts* include:
1. the context of the statement or statements in question;
2. the reaction of the recipient or listeners; and
3. whether the threat was conditional.

The above case law speaks specifically to the post made on Instagram (People’s Exhibit 4-N) “1,2 I’m coming for your 3, 4 you better lock your door @gewhitmer”. This post was made by Joseph Morrison before a protest where he was in-fact allowed into the doors of the capitol building after cooperating with all covid and entry procedures. The quote is also from the movie “Nightmare on Elm Street” lending to political hyperbole and satire that it is. There was no reaction of any recipients as there are no likes and no comments on the post shown.

Wherefore, for the reasons stated above Joseph Morrison's speech is Constitutionally protected and not a True Threat because it meets the test for politically hyperbole set out by *Watts*.

II. Defendant's statement does not meet the elements of the charge of making a Terrorist Threat as a matter of law because it was communicated only to his like-minded group and therefore not a True threat.

The meaning of a particular speech must be considered in its context. *Watts*, 394 US at 708. This may require consideration of current events and popular culture. *People v Byczek*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350341). In the case of People v. Gerhard, Defendant posted onto a public "Snapchat" page where he knew hundreds of people would see his post an image of his AR-15 and the words "bringing this bad boy up, this outta make the snowflakes melt, Aye". The Court of appeals in Gerhard affirmed the bindover because they said Gerhard knew that his statement would be seen by many where somebody could take it as a threat.

The appellate court reasoned "This is clearly not a situation in which a person shares a private post with a limited number of known associates, only to discover that one of those associates breached his trust by sharing it further. Rather, defendant clearly intended his post to be essentially public. There is no evidence that the post was made accidentally, or that defendant was unaware of its contents or its audience. The evidence establishes that defendant intended to communicate the contents of the post with "any other person," including the people he regarded as "snowflakes." *People v. Gerhard, __Mich App__*(Docket No. 354369, June 24, 2021). As a general matter, a person "may not be punished because [he or she] negligently overlooked the possibility that someone else would show [a person not intended as a recipient] the Snapchat

contents." *In re JP*, 330 Mich App 1, 18-19; 944 NW2d 422 (2019). *People v. Gerhard, __Mich App__*(Docket No. 354369, June 24, 2021). The Appellate court reasoned that "*This is clearly not a situation in which a person shares a private post with a limited number of known associates, only to discover that one of those associates breached his trust by sharing it further." People v. Gerhard, __Mich App__*(Docket No. 354369, June 24, 2021). To constitute a true threat, defendant must have made the communication "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat," rather than merely recklessly. *Elonis v United States*, 575 US 723, 740; 135 S Ct 2001; 192 L Ed 2d 1 (2015).

The Gerhard case differs from our case at hand where the any possible threat was communicated only to a closed group of "Wolverine Watchmen" and/or like-minded individuals. Any possible threatening words were shared only with the limited number of known associates. The people's argument that because "Dan" was really working for the FBI takes him outside of this circle is wrong. Discovering later that one of the recipients broke the speaker's trust does not make the statement a true threat as reasoned by the court of appeals. We look to the speaker's intent in the communication, not the secret intention of a listener.

Wherefore, for the above reasons nothing Joseph Morrison communicated was a True threat, the district court did not abuse its discretion when it decided not to bind over on the One count of "making and communicating a threat of terrorism". We ask this honorable court to deny

the people's motion to amend the information to add back the charge of "of making and communicating a threat of terrorism".

Sincerely,

/s/ Nicholas P. Somberg

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